Supreme Court, U.S.
FILED
MAY 31 1995
OFFICE OF THE CLERK

(3)

No. 94-1683

In The

Supreme Court of the United States

October Term, 1994

DELTA AIRLINES, INC.,

Petitioner,

versus

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF OF PETITIONER DELTA AIRLINES, INC.

FRANCIS G. WELLER
of
DEUTSCH, KERRIGAN & STILES
755 Magazine Street
New Orleans, La. 70130
Telephone: (504) 581-5141
Attorney for Petitioner
Delta Airlines, Inc.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

1122

TABLE OF AUTHORITIES

Page

CASES

A. H. Robins Co., Inc. vs. Piccinin, 788 F.2d 994 (4th Cir. 1986) 7

Benson and Ford, Inc. vs. Wanda Petroleum Co., 833 F.2d 1172 (5th Cir. 1987) 7

FDIC v. Colonial Realty Co., 966 F.2d 57 (2d Cir. 1992) 8

In Re: Franklin, 802 F.2d 324 (9th Cir. 1986) 7

In Re: Haug, 19 B.R. 223 (Bankr. D. Ore. 1982) 8

In Re: Income Property Builders, Inc., 699 F.2d 963 (9th Cir. 1982) 7

In Re: Joint E & So. Dist. Asbestos Litigation, 769 F.Supp. 85 (E. & S.D. N.Y. 1991) 8

Pepper v. Litton, 308 U.S. 295 (1939) 9

In Re: Taylor, 884 F.2d 478 (9th Cir. 1989) 7

Santo Padre vs. Pelican Homestead & Savings Association, 937 F.2d 268 (5th Cir. 1991) 8

STATUTES AND RULES

28 U.S.C. § 2283 3

La. R.S. 23:1102 ..... 3, 4

Rule 1.05, Uniform Local Rules, U.S. Dist. Ct., E.D. La. 5

No. 94-1683

In The

Supreme Court of the United States

October Term, 1994

DELTA AIRLINES, INC.,

Petitioner,

versus

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF OF PETITIONER DELTA AIRLINES, INC.

Taking in sequence some of the assertions by Respondent National Union in opposition to Delta's Petition, Delta replies as follows:

1 – National Union says it submits a statement of the case "to address perceived misstatements of fact in the statement of the case submitted by petitioner, Delta Airlines, Inc." (Respondent's Brief, hereinafter referred to as "RB", p. 4)

Delta Replies: What "misstatement"? Where? National Union does not identify any such "misstatement", nor is there any.

2 – National Union says that following the dismissal of Delta's third party complaint in the bankruptcy court on January 15, 1993, "Delta then commenced a new adversary proceeding . . . " (RB, p. 5.)

Delta Replies: True, but it was filed at the express suggestion of the bankruptcy court, which in its dismissal of Delta's third party complaint stated that the dismissal was "without prejudice to be refiled, if warranted, as a declaratory judgment action." (See Delta's Petition for Writ of Certiorari, p. 7.) Would it have made any difference in the continuity of the original adversary proceeding had Delta simply filed its Complaint for Declaratory Judgment in that previous proceeding rather than initiating a new one at the invitation of the bankruptcy court? Delta submits that it would not. Although the bankruptcy court dismissed the third party action, it continued in effect the preliminary junction it had issued, the same injunction later made permanent in the Complaint for Declaratory Judgment.

3 – National Union argues that it was not a party to the adversary proceeding when the bankruptcy court commanded Delta to deposit the judgment in the registry of the bankruptcy court, and therefore the bankruptcy court lacks jurisdiction to enjoin National Union, a non-party to the original adversary proceeding. (RB, pp. 7, 13, 21, 25.)

Delta Replies: Neither the district court nor the Court of Appeals apparently considered this

argument in their decisions. The district court simply held that because the bankruptcy petition had been dismissed, the bankruptcy court lacked jurisdiction to issue a subsequent injunction, and the Court of Appeals affirmed the district court on that ground. Delta pointed this out on page 9 of its Petition, footnote 5:

> "Since the appellate and district courts relied solely on the district court's 'reasons relating to subject matter jurisdiction' in denying Delta relief, Delta does not now discuss in this petition any of National Union's other arguments against the injunction, for example, those relating to the 'relitigation exception' to the Injunction Act, 28 U.S.C. 2283, and lack of 'notice' of the bankruptcy court's deposit order, all of which arguments were previously briefed but apparently were not considered by either the appellate or district courts essential to, or dispositive of, the issue of the validity of the bankruptcy court's injunction decree."

4 – National Union claims that Delta, in effect, "settled" its obligation to the Schwambs, without first notifying National Union, as a tortfeasor would be required to do under Louisiana law if it were going to *compromise* the victim's claim. (RB pp. 20, 22; R.S. 23:1102; Delta's Petition for Writ, App. 30, 33.)

Delta Replies: This agument was urged vigorously by National Union in the lower courts, and was rejected. The bankruptcy court said:

> "After carefully considering this matter, this Court finds that Delta had no obligation to notify National Union of the proceedings in

> this Court. The cases cited by National Union concerning this issue [citing] are inapposite to the case at bar. These cases stand for the proposition that the 'settling tortfeasor' may be liable to a worker's compensation intervenor if the settlement is made without notice to the intervenor. As Delta had pointed out, Delta did not settle, or compromise any claim. Pursuant to this Court's order, Delta satisfied a judgment by paying the amount of money due into the registry of this Court."
>
> – Delta's Petition for Writ, App. 14, 15.

See also R.S. 23:1102, attached as App. 33 to Delta's Petition for Writ, in which the word "compromise" is used 14 times. National Union's charge that Delta "effected the equivalent of an illicit, out-of-court settlement without notice to National Union", is patently absurd. Why on earth would Delta want to conceal from National Union the fact that Delta was paying off the judgment? National Union offers no explanation for such a baseless accusation, and neither the district court nor the Court of Appeals apparently considered it.

National Union insinuates that the bankruptcy court's comment that an "injustice has been done" because of lack of notice (Petition for Writ, App. 20) was intended as a reproof of Delta. (RB pp. 12, 22, 27.)

Delta Replies: The bankruptcy court's remark was clearly in reference to "Delta's reply memorandum filed this date", in which Delta pointed out that the Schwambs and their counsel had not given notice to National Union of their plans to pay off all interested parties

except National Union, and dismiss the bankruptcy petition. (See Petition for Writ, pp. 18-19, App. 20.)

6 – National Union claims that Delta's problems are the consequence of Delta's failure to comply with a local federal court rule requiring that when a civil matter is commenced, counsel shall append to the complaint a description of all other actions relating to the case, "whether civil or criminal, then pending before this or another court or an administrative agency . . . " (RB pp. 3, 27, 29.)

Delta Replies: Although National Union raised this issue in the bankruptcy court and in the district court, it apparently abandoned it in the Court of Appeals, since it was never mentioned in National Union's brief or argument to that court. In any case, the bankruptcy court rejected the argument. Pretermitting the question of whether or not the reference in the rule to "this or another court or an administrative agency" includes a state court, the bankruptcy court said:

> "Finally, this Court finds that National Union's charge that Delta violated Local Rule 1.05 is without merit. As Delta points out, this rule is directed to a party who files a lawsuit ('counsel shall append on a separate sheet of paper, the front of the complaint . . . '). Delta was brought into the original adversary proceeding in this matter, Adv. No. 88-0099-K, commenced on April 4, 1988, as a defendant. The only participation of Delta in the proceeding was to comply with the Court's order that Delta

> deposit the amount of the state court judgment into the registry of the Court. Therefore, this Court rejects this argument of National Union."
>
> – Delta's Petition for Writ, App. 15.

As a matter of fact, the bankruptcy court *had been informed* that Schwamb owed reimbursement of compensation benefits out of the money deposited in the registry of the bankruptcy court. In his Disclosure Statement to the bankruptcy court, Schwamb included as "Contemplated Future Litigation" the following: "Litigation which would seek reimbursement of worker's compensation payments . . . estimated to be approximately $100,000.00." (Rec. 126, p. 9.) The problem is not that the bankruptcy court was not notified of the obligation of Schwamb to National Union; it is that Schwamb did not notify National Union of the pending distribution of the money and dismissal of the bankruptcy. Throughout its brief, National Union states, suggests or implies that Delta owed to National Union a legal duty to notify National Union of the deposit of the judgment into the registry of the bankruptcy court. (RB pp. 5, 13, 14, 20, 21, 22, 23, 25, 27, 28, 29.) No authority is cited for this assertion. It was not considered by either the district court or the Court of Appeals and it supplied no basis for the reversal of the bankruptcy court.

NATIONAL UNION'S LEGAL ARGUMENTS AND AUTHORITIES

National Union cites few cases that were not discussed in Delta's petition for writ. Delta submits that it is entitled, under those authorities, to the relief it seeks, and further submits that none of National Union's arguments with respect to those authorities, or to additional ones it has cited, militate against that relief.

In Re: Income Property Builders, Inc., 699 F.2d 963 (9th Cir. 1982) concerns the dismissal of an untimely appeal from the dismissal of a bankruptcy case. *Taylor* and *In Re: Franklin*, 802 F.2d 324 (9th Cir. 1986) are cited in *In Re: Taylor*, 884 F.2d 478 (9th Cir. 1989), cited for comparison in Delta's petition for writ, p. 12. *Benson and Ford, Inc. vs. Wander Petroleum Co.*, 833 F.2d 1172 (5th Cir. 1987) is cited in support of National Union's "relitigation" argument, an issue that was not considered by either the district court or the Court of Appeals. (See above.) Moreover the central issue in *Benson*, that is, whether plaintiff was precluded from pursuing an action because plaintiff was bound by a judgment in an earlier case involving other parties with whom it was alleged plaintiff was in privity, is inapplicable here.

The language of *A. H. Robins Co., Inc. vs. Piccinin*, 788 F.2d 994 (4th Cir. 1986) is actually supportive of the bankruptcy court's authority here to "prevent suits against third-party defendant (read "Delta") . . . when there is such identity between debtor (read "Schwamb") and third-party defendant (read "Delta") that debtor (read "Schwamb") may be said to be the real party defendant and judgment against third-party defendant (read "Delta") will in effect be judgment or finding against

debtor (read "Schwambs'). It is Schwamb who owes the money here to National Union, Delta being only a surrogate party with deep pockets if Schwamb won't pay.

FDIC v. Colonial Realty Co., 966 F.2d 57 (2d Cir. 1992) confirms the equitable powers of the bankruptcy court, but is inapplicable to this case. *In Re: Haug*, 19 B.R. 223 (Bankr. D. Ore. 1982) is likewise inapplicable. It simply held that a complaint to obtain a judgment for damages and a determination of non-dischargeability against the debtor were not civil proceedings arising under Title 11 and therefore could not be prosecuted in the bankruptcy court. The facts of *Haug* are not analagous to this case, nor do its rubrics regarding bankruptcy court jurisdiction argue against Delta's position here.

In Re: Joint E & So. Dist. Asbestos Litigation, 769 F.Supp. 85 (E. & S.D. N.Y. 1991) affirms the general ancillary jurisdiction of a federal court over an impleaded third-party claim. National Union contrasts it with the bankruptcy's court dismissal of Delta's third-party claim (RB p. 16, footnote 18), but Delta submits the case is irrelevant. Delta's Complaint for Declaratory Judgment was substituted for its third-party claim at the suggestion of the bankruptcy court. The common thread, i.e., the injunction issued in the adversary proceeding, continued through the Complaint for Declaratory Judgment.

Santo Padre vs. Pelican Homestead & Savings Association, 937 F.2d 268 (5th Cir. 1991) argues the "relitigation" issue, which, again, was not considered by either the district court or the Court of Appeals which decided only that the bankruptcy court could not issue the injunction because the bankruptcy petition (but not the adversary

proceeding) had been dismissed and there existed, therefore, no "estate" upon which the bankruptcy order could have a "conceivable effect".

Other cases cited by National Union concern the baseless charge that Delta improperly "settled" with the Schwambs, or are so tenuously related to the issues here as to constitute distractions. Delta submits that National Union has cited a patchwork of discrete orders, holdings and observations in a variety of circumstances, the totality of which does not supply a coherent, legal rationale to deny to Delta the relief it seeks.

It cannot be that a party should fulfill all its legal obligations to everyone by complying with a federal court order, and then, when threatened with state litigation as a consequence of its obedience to the federal court order, be abandoned by the system, to "twist, slowly, slowly in the wind."

> "They (the equitable powers of a bankruptcy court) have been invoked to the end that fraud will not prevail, that substance will not give way to form, that technical considerations will not prevent substantial justice from being done."
>
> – *Pepper v. Litton*, 308 U.S. 295, 304-305 (1939)

That is all the bankruptcy court did when it issued the injunction in this case.

Respectfully submitted,

FRANCIS G. WELLER
of
DEUTSCH, KERRIGAN & STILES
755 Magazine Street
New Orleans, La. 70130
Telephone: (504) 581-5141
Attorney for Petitioner